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Reference for Prosecution in Juvenile Court Proceedings

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I. INTRODUCTION

The Minnesota Juvenile Court Act includes cases involving children who have allegedly violated the law within the juvenile court's delinquency jurisdiction.[1] Under certain circumstances, however, the juvenile court may waive such jurisdiction and refer a case for prosecution in a court of criminal jurisdiction as though the child were an adult.[2] Although whether to refer a juvenile for prosecution as an adult offender is among the most serious decisions a juvenile court must make, the Minnesota statute lacks adequate procedural and substantive standards to guide the court and other participants in this decision-making process.

Article 8 of the recently adopted Minnesota Juvenile Court Rules was designed to establish both procedural and substantive criteria applicable to the juvenile court's decision to refer for prosecution. The Article is an attempt to cure the defects in the statute, to establish uniform procedure in Minnesota, and to assure that recent Supreme Court requirements are met.

The purpose of this Note is to analyze Article 8 as a response to the problems inherent in the reference process. In addition, the Note will compare the Minnesota approach with rule and statutory approaches in other jurisdictions and suggest possible improvements in the Article.

II. BACKGROUND

A. General

Central to all juvenile court acts is the policy determination that young persons who violate the law are not to be treated as

1. The jurisdiction of the juvenile court extends also to acts not in violation of the criminal law. *See* Minn. Stat. § 260.111 (1967), conferring jurisdiction on the juvenile court in proceedings concerning any person under 18 alleged to be delinquent, a juvenile traffic offender, neglected or dependent, and in proceedings concerning any minor alleged to have been delinquent or a juvenile traffic offender prior to becoming 18. The definition of "delinquent child" includes not only law violators but also, for example, persons who "habitually deport" themselves in a manner that is "injurious or dangerous" to themselves or others. *Id.* § 260.015(5)(e). The issues considered in this Note, however, arise only where a violation of law is alleged.

2. Many statutes refer to the process as "waiver of jurisdiction." *See, e.g.*, D.C. Code Ann. § 11-1553 (1966). In Minnesota, it is termed "reference for prosecution." Minn. Stat. § 260.125 (1967). While the processes are not identical, *see* note 21 *infra*, the Minnesota terminology, "reference for prosecution" will be used in this Note.

adult offenders. Nonetheless, statutes in nearly all jurisdictions provide a method whereby juveniles may be tried in the criminal court.[3] While the statutory schemes vary considerably,[4] the majority of states provide the juvenile court with original and exclusive jurisdiction for all juveniles, with discretionary power to waive its jurisdiction and refer the case for prosecution in all or certain specified cases.[5]

The issue of reference for prosecution generally arises where the alleged offense is particularly serious, or where the youth has committed a number of offenses.[6] Reference for prosecution deprives the child of all the benefits conferred by the juvenile court act upon juveniles as a group. In addition to the risk of

3. Some jurisdictions have not adopted this approach, however. New York juvenile courts have "exclusive original jurisdiction" over delinquency cases, without provision for transfer to criminal court. Thus, children under 16 (the jurisdictional age) cannot be tried in criminal court under any circumstances. N.Y. FAM. CT. ACT § 713 (McKinney 1963).

4. Some jurisdictions grant the criminal court jurisdiction concurrent with the juvenile court, allowing the criminal court to assert or waive its jurisdiction. *See, e.g.*, CAL. WELF. & INSTN'S CODE §§ 600, 604 (West 1966) where the juvenile court's jurisdiction is exclusive to age 18, and is concurrent with the criminal court from age 18 to 21. California also permits waiver of jurisdiction by the juvenile court of a minor 16 or over. *Id.* § 707 (Supp. 1968). Others lodge discretion with the State's Attorney to determine in which court the action is to be brought. *E.g.*, ILL. REV. STAT., ch. 37, § 702-07 (Supp. 1969). This practice is now of doubtful validity under the ruling in Kent v. United States, 383 U.S. 541 (1966). *See* text accompanying notes 10-14 *infra*. A small number of jurisdictions grant the criminal courts exclusive jurisdiction over particular offenses, usually those of a serious nature. *E.g.*, IND. STAT. ANN. § 9-3204 (Supp. 1968). This scheme has been criticized as incompatible with the avowed rehabilitative purpose of the juvenile court system. *See, e.g.*, U.S. CHILDREN'S BUREAU, U.S. DEP'T OF HEW, STANDARDS FOR JUVENILE AND FAMILY COURTS 34 (1966).

5. *E.g.*, MINN. STAT. § 260.125 (1967). This method is favored by the MODEL PENAL CODE, § 4.10, Comment (Tent. Draft No. 7, 1957); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND AD. OF JUSTICE, TASK FORCE REPORT, JUVENILE DELINQUENCY AND YOUTH CRIME 25 (1967) [hereinafter cited as TASK FORCE]. Most statutes of this type place the discretionary authority solely in the juvenile court. Once jurisdiction is waived, the prosecutor has no authority to refuse to accept reference. *See, e.g.*, TEX. CIV. STAT. art. 2338-1(6)(j) (Supp. 1968); D.C. CODE ANN. § 11-1553 (1966). The Minnesota statute is to the contrary, placing further discretion in the prosecutor. *See* note 21 *infra*.

6. *See, e.g.*, State *ex rel.* Craig v. Tahash, 263 Minn. 158, 116 N.W.2d 657 (1962) (first degree robbery); State v. Dehler, 257 Minn. 549, 102 N.W.2d 696 (1960) (first degree murder); State *ex rel.* Pett v. Jackson, 252 Minn. 418, 90 N.W.2d 219 (1958) (first degree murder); State *ex rel.* Knutson v. Jackson, 249 Minn. 246, 82 N.W.2d 234 (1957) (second degree murder).

receiving the maximum punishment which the criminal law allows—including incarceration long past age 21—the confidential nature of the juvenile court is replaced by the publicity associated with the criminal courts. If found guilty, the juvenile acquires a criminal record, resulting in the loss of certain civil rights including eligibility for particular types of public employment.[7] While reference is not a frequent occurrence in the juvenile court in terms of total dispositions,[8] it may indeed be the most severe sanction which the juvenile court can impose. It is the instrument by which the juvenile court may choose to subject a youth to the severe consequences of the criminal law, and is in effect the first stage in a criminal prosecution.[9]

The statutes generally do not establish procedural requirements governing the reference process. The Supreme Court considered the lack of such requirements in its first juvenile court

7. *See generally* Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583 (1968); Comment, *Representing the Juvenile in Waiver Proceedings*, 12 ST. L.U.L.J. 424 (1968); Comment, *Separating the Criminal From the Delinquent: Due Process in Certification Procedure*, 40 So. CAL. L. REV. 158 (1967).

8. *See* Advisory Council of Judges, National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts*, 8 CRIME & DELINQ. 3, 10 (1962); Ketcham, *Statistical Comparison of Children's Courts Serving the Nation's Twelve Largest Cities*, 13 JUV. CT. JUDGES J. 14 (1962); Schornhorst, *supra* note 7, at 589 n.45; Young, *Significant Recent Cases*, 17 JUV. CT. JUDGES J. 97 (1966).

Figures contained in Minnesota Department of Corrections reports indicate that in fiscal year 1966-67, the 84 probate-juvenile courts in Minnesota disposed of 7317 petitions, 350 of which were referred for prosecution. MINNESOTA DEP'T OF CORRECTIONS, COUNTY JUVENILE COURT AND PROBATION OFFICE REPORT (1966-67).

9. Many supporters of the juvenile court have criticized the process of reference for prosecution as a facade for society's insistence on punishment in particular cases and as inconsistent with the rehabilitative philosophy of the juvenile court. *See, e.g.*, Sargent & Gordon, *Waiver of Jurisdiction: An Evaluation of the Process in the Juvenile Court*, 9 CRIME & DELINQ. 121 (1963). Others have argued that this view stems from a failure to recognize that the juvenile court is a complex legal institution which embraces a wide range of values. These writers have insisted that the view of the juvenile court as a wholly rehabilitative institution is inadequate because it fails to explain the activity of the court in cases where it is incapable of achieving its rehabilitative objectives. Thus, it is argued, in many cases the juvenile court performs functions essentially similar to those exercised by any court adjudicating cases of persons charged with dangerous behavior—reasserting community norms, protecting community security and deterrence—by such measures as it has at its disposal, as unsatisfactory as those measures may be in a particular case. *See, e.g.*, Allen, *The Juvenile Court and the Limits of Juvenile Justice*, 11 WAYNE L. REV. 676 (1965).

decision, *Kent v. United States*.[10] In *Kent*, the juvenile court had referred the case for prosecution and, in the district court, the juvenile was found guilty of housebreaking and robbery. The Court considered only the issue of the procedural adequacy of the juvenile court's reference for prosecution[11] under the District of Columbia statute, which required a "full investigation" prior to reference.[12] The Court held that the statute, "read in the context of constitutional principles relating to due process and the assistance of counsel," required as a condition of a valid referral order: (1) a hearing on the issue, (2) access by counsel to social reports considered by the court and (3) a statement of the reasons for the juvenile court's decision.[13] Because of the Court's emphasis upon the "constitutional principles" involved, it seems clear that the holding has implications beyond the District of Columbia statute.[14]

Corresponding to the omission of procedural requirements, the various reference for prosecution statutes also lack substantive standards to govern the reference decision. Although the statutes usually establish minimum ages at which reference can be considered, some do not limit the nature of the acts for

10. 383 U.S. 541 (1966). This decision prompted re-evaluation of reference statutes in many jurisdictions, and has led to statutory revisions in some states, and to the adoption of rules of procedure governing reference in others. *See, e.g.*, TEX. CIV. STAT., art. 2338-1 (Supp. 1968); DISTRICT OF COLUMBIA, JUVENILE COURT RULES (1966); MICHIGAN JUVENILE COURT RULES (1969); RULES OF PROCEDURE FOR JUVENILE COURT PROCEEDINGS IN THE MINNESOTA PROBATE-JUVENILE COURTS (1969), *as amended*, (Supp. Sept. 1969) [hereinafter cited as MJCR].

11. Both the district court's verdict and the juvenile court's decision to refer were challenged on various procedural grounds.

12. The District of Columbia statute is representative of those statutes which establish neither procedural nor substantive criteria:

> When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony, or when a child under 18 years of age is charged with an offense which if committed by a person 18 years of age or over is punishable by death or life imprisonment, a judge may, after full investigation, waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over . . . .

D.C. CODE ANN. § 11-1553 (1966).

13. 383 U.S. 541, 557 (1966).

14. *Kent* has been followed by Paquette v. Langlois, 101 R.I. 1, 219 A.2d 569 (1966); Peyton v. French, 207 Va. 73, 147 S.E.2d 739 (1966); *In re* Dillenberg v. Maxwell, 70 Wash. 331, 413 P.2d 940 (1966). The New Mexico Court has interpreted *Kent* restrictively, State v. Acuna, 78 N.M. 119, 428 P.2d 658 (1967). *See generally* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167.

which reference is possible.[15] A few statutes provide some criteria for consideration[16] but most provide for reference on grounds solely within the discretion of the juvenile court.[17] Thus, most juvenile courts have been left with the responsibility for fashioning their own criteria for reference.

This lack of standards has handicapped the youth and his counsel in arguing against reference. Further, the opportunity for abuse of the court's discretion appears to have been substantial[18] since typically, the juvenile judge has not even been required to state the reasons on which he bases his decision to refer. As a result, appellate review of a reference decision has been difficult to obtain,[19] and the crucial decision on which the distinction between crime and delinquency turns has been obscure and ill-defined.

B. Minnesota

The juvenile court in Minnesota has original and exclusive jurisdiction over any person under 18 who is alleged to be delinquent and over any minor alleged to have been delinquent prior to reaching the age of 18.[20] However, the juvenile court has authority to waive its jurisdiction and refer the case for prosecution in accordance with the requirements of the reference statute.[21] The Minnesota Act—like all juvenile court acts—further provides that a violation of state or local law by a youth

15. *Compare* D.C. Code Ann. § 11-1553 (1966), which establishes age and offense limitations, *with* Minn. Stat. § 260.125 (1967), which provides no limitation on the offense. *See* notes 12 *supra* and 23 *infra*.

16. *E.g.*, Tex. Civ. Stat., art. 2338-1(6)(h)(1)-(6) (Supp. 1968).

17. *E.g.*, D.C. Code Ann. § 11-1553 (1966), quoted at note 12 *supra*.

18. *See, e.g.*, United States v. Caviness, 239 F. Supp. 545 (D.D.C. 1965), *infra* note 63.

19. *See generally* Note, *Rights and Rehabilitation in the Juvenile Court*, 67 Colum. L. Rev. 281, 313-14 (1967); Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. Pa. L. Rev. 1171 (1966).

20. Minn. Stat. § 260.111 (1967).

21. Minn. Stat. § 260.125 (1967). The Minnesota reference statute differs from the waiver statutes of other jurisdictions in that the case is *referred* to the prosecutor who determines whether or not to prosecute. If the prosecutor decides not to prosecute, the juvenile court must proceed with the case. *Compare* the Minnesota juvenile traffic offender procedure wherein the juvenile court *transfers* the case to the court of competent jurisdiction and the prosecutor has no authority to determine whether or not to prosecute. Minn. Stat. § 260.193 (1967).

under 18 is not designated a crime unless the case is referred to an appropriate prosecuting authority.[22]

The Minnesota reference statute allows the court to refer any juvenile charged with a violation of law who is 14 years of age or older.[23] Unlike the statutes of many jurisdictions, the Minnesota statute does provide certain basic procedural requirements to govern the process. It requires that the court, after giving notice, hold a hearing on the issue of whether to refer the case for prosecution. The statute, however, is silent on the nature of the hearing to be held.[24]

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22. MINN. STAT. § 260.215 (1967).

23. MINN. STAT. § 260.125 (1967) provides:

Subdivision 1. When a child is alleged to have violated a state or local law or ordinance after becoming 14 years of age the juvenile court may enter an order referring the alleged violation to the appropriate prosecuting authority for action under laws in force governing the commission of and punishment for violations of statutes or local laws or ordinances. The prosecuting authority to whom such matter is referred shall within the time specified in such order of reference, which time shall not exceed 90 days, file with the court making such order of reference notice of intent to prosecute or not to prosecute. If such prosecuting authority files notice of intent not to prosecute or fails to act within the time specified, the court shall proceed as if no order of reference had been made. If such prosecuting authority files with the court notice of intent to prosecute the jurisdiction of the juvenile court in the matter is terminated.

Subdivision 2. The juvenile court may order a reference only if

(a) A petition has been filed in accordance with the provisions of section 260.131

(b) Notice has been given in accordance with the provisions of sections 260.135 and 260.141

(c) A hearing has been held in accordance with the provisions of section 260.155, and

(d) The court finds that the child is not suitable to treatment or that the public safety is not served under the provisions of laws relating to juvenile courts.

Subdivision 3. When the juvenile court enters an order referring an alleged violation to a prosecuting authority, the prosecuting authority shall proceed with the case as if the jurisdiction of the juvenile court had never attached.

24. The statutory provisions were substantially revised in 1959. The prior reference statute had established no standards but allowed the court to refer any juvenile over 12 years solely in its discretion. The act required, however, notice to the parents if their addresses were known. In State *ex rel.* Knutson v. Jackson, 249 Minn. 246, 82 N.W.2d 234 (1957), the Minnesota Supreme Court held that the notice requirement of the statute was jurisdictional. Hence, the juvenile court's failure to notify the juvenile's mother of the reference hearing invalidated the subsequent reference order. The juvenile thus could not be prosecuted in the criminal court prior to a valid reference proceeding in the juvenile court.

The 1959 revision was apparently intended to stress the seriousness of the reference proceeding. In addition to raising the minimum age

The Minnesota statute conforms with two of the three procedural requirements of a valid reference order established by *Kent*.[25] The statute has long required a hearing and was amended in 1967 to provide for access by counsel to social records.[26] However, it fails to comply with *Kent* by not requiring a written statement of the court's reasons for its decision.[27]

Substantively, before the court can order reference, it must find that the child is "not suitable to treatment" or that the "public safety is not served" under the provisions of the juvenile court laws.[28] The statute, however, neither defines these conclusions nor indicates what factors are relevant to their determination. It seems likely that the criteria deemed relevant may vary substantially between courts. Neither the Supreme Court in *Kent* nor the Minnesota Supreme Court has ever considered the issue of the propriety of substantive criteria for making the reference decision.

III. ANALYSIS OF MINNESOTA JUVENILE COURT RULES, ARTICLE 8: REFERENCE FOR PROSECUTION

Article 8 of the Minnesota Juvenile Court Rules was promulgated to provide specific procedural and substantive standards governing the juvenile court's waiver of jurisdiction under the reference for prosecution section of the Minnesota statute. Generally, it provides how, when, and who may make the motion for reference. It prescribes the content of the notice of the hearing on the issue. The Article incorporates by reference the basic Article 2 rights of the juvenile at the hearing, for example, the right to counsel and the right to remain silent. The Article clarifies what evidence is admissible at the reference hearing. Further, the Article indicates specific criteria deemed relevant to the decision to refer the juvenile for prosecution as an adult.

A. THE CHILD'S REQUEST FOR REFERENCE FOR PROSECUTION

The Minnesota statute does not specify who may request

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at which criminal prosecution is permitted from 12 to 14, it specified the procedural requirements to entering a valid reference order in light of *Knutson*. *See generally* Pirsig, *Juvenile Delinquency and Crime: Achievements of the 1959 Minnesota Legislature*, 44 MINN. L. REV. 363 (1960).

25. 383 U.S. 541 (1966). *See* text accompanying notes 10-14 *supra*.

26. MINN. STAT. § 260.161(2) (1967).

27. *See* MINN. STAT. § 260.125(2)(d) (1967), quoted at note 23 *supra*.

28. *Id.*

reference for prosecution.[29] However, the juvenile logically has the same right as the county attorney to request such an order. Accordingly, the Rules provide that the child may initiate the request for reference.[30]

Although in most cases the juvenile would probably choose to be adjudicated by the juvenile court rather than by the criminal court, there appear to be exceptions. One such situation might be where the offense alleged is a minor traffic violation or a relatively insignificant misdemeanor. The juvenile may feel that the light criminal sanction would be less severe than the juvenile court disposition.[31] A second case might arise where a serious offense is alleged, but the juvenile denies guilt. He may have a defense—impossibility or mistake, for example—which he thinks would be more effective in the criminal court or he may want the benefit of certain procedural safeguards of the criminal court unavailable in the juvenile court, such as the right to a jury. In these circumstances, the juvenile may receive more favorable treatment in the criminal court than in the juvenile court.

It might be argued that the juvenile should be allowed to benefit from any advantages of the criminal proceeding if he so desires, on the rationale that he should not receive a more severe disposition in the juvenile court than he would receive if an adult.[32] Whether or not this rationale is sound, the juvenile will face a substantial problem arguing that he should be referred under the Minnesota statute. Due to the two bases of reference specified in the statute, the juvenile would be placed in the untenable position of arguing that he is either unsuitable for the court's beneficient treatment, or that he is sufficiently dangerous that the public safety could not otherwise be served.

In the first case posited above—the minor traffic offense or misdemeanor—the court might grant the juvenile's motion to refer under the finding of unsuitability. This might be a sound

29. MINN. STAT. § 260.125(1) (1967).

30. MJCR 8-1(1).

31. *See generally* Note, *supra* note 19, at 318-19; Comment, *Representing the Juvenile, supra* note 7. Reference would, of course, be unavailable in this instance in those jurisdictions which require an act which would be a felony if committed by an adult as a condition of reference.

32. *See, e.g., In re* Gault, 387 U.S. 1 (1967), where the law which Gault allegedly violated provided a penalty, if the offender were an adult, of a fine of $5 to $50, or imprisonment for not more than two months. 387 U.S. at 8-9. Gault, then age 15, was committed by the juvenile court to the state industrial school until age 21. 387 U.S. at 7.

conclusion if the juvenile's record indicated a series of unsuccessful efforts by the juvenile court to treat the child. In such a case, he may not in fact be suitable to the juvenile court's treatment options and the court may conclude that a mild criminal penalty is a preferable disposition.[33] However, it is difficult to see how a request for referral in the second case—an alleged serious offense where guilt is denied—could be granted under a valid finding of either unsuitability or danger to the public. It appears erroneous to argue that the juvenile should be referred solely because the alleged offense is serious,[34] and, if the juvenile is not guilty, as the juvenile court is as able to correctly determine that issue as the criminal court. Further, there is no reason why a juvenile who may have a defense thought more effective in a criminal court should be referred for that reason. The basis for reference is a finding of either unsuitability or danger to the public, not the juvenile's assertion of a particular defense.[35] Therefore, while it appears appropriate to allow the juvenile the right to request reference for prosecution, the statutory bases of reference will likely preclude reference except in cases of minor offenses.

B. Content of Notice

If the juvenile judge believes that retention of jurisdiction would be contrary to the best interests of the child or the public safety, he enters a reference order which fixes the time for a hearing, states that reference will be considered and sets forth the reasons for consideration of reference.[36] Notice of the hearing, including the reasons for consideration of reference, must be given to the parties.[37] The child and his counsel are

33. This disposition would seem particularly appropriate in traffic offender cases, since the juvenile court cannot impose a fine and may feel that its other alternatives, such as recommending suspension of the juvenile's license, are unnecessarily severe.

34. *See* text accompanying notes 69 & 70 *infra.*

35. The statutory provisions of Colo. Rev. Stat. Ann. § 37-8-7 (1963) and Ill. Stat. Ann., ch. 37, § 702-7(5) (1966) provide that a juvenile has a *right* to a criminal trial if he so demands. These provisions have been criticized on the ground that the proper basis of reference is that the juvenile will not benefit from the rehabilitative efforts of the juvenile court, not that he disdains them. *See* Note, *supra* note 19, at 319-20.

36. MJCR 8-1(3).

37. The Rules provide that if summons and notice in connection with the adjudicatory hearing have not yet been issued and served, notice of the reference hearing shall be given in such summons and notice. MJCR 8-2(1), 4-2(c). If summons and notice of the adjudicatory hear-

thus provided with the opportunity for some preparation to meet the issues which are likely to be raised at the reference hearing.

However, the Rules do not require that the notice contain a statement of the alleged facts supporting the reasons for the consideration of reference.[38] Because of the severe sanctions that may follow reference for prosecution,[39] the notice afforded the child should be as complete as possible. At the *adjudicatory* hearing, the need for notice of specifically alleged facts is obviously critical because the result of that hearing depends upon the existence of these facts. While at the reference hearing the court need only conclude that one of the statutory grounds is met, such a conclusion also must rest upon particular facts. Since the child should have the fullest opportunity to refute the allegations of fact, just as he may do at the adjudicatory hearing, notice of such facts appears desirable.[40]

Further, reference is an exceptional procedure in that the juvenile court terminates its responsibility for dealing with the relatively few juveniles who are incapable of benefiting from juvenile facilities.[41] Since only particular facts make consideration of reference appropriate, notice of these facts should be given to assure that the parties have the opportunity to present all relevant information.

C. Appointment of Counsel

Under the Minnesota statute, the juvenile has a right to counsel, and if necessary, counsel will be appointed by the

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ing have been issued and served, a copy of the reference order is to be served on the parties. MJCR 8-2(2).

38. The notice could contain as little as a statement that reference will be considered either on the ground that the child is unsuitable for treatment under juvenile facilities or that the public safety requires reference.

39. *See* text accompanying notes 6 & 7 *supra.*

40. The Rules appear to be inconsistent in requiring the county attorney to allege facts supporting reasons in the petition for reference, MJCR 8-1(2), yet deleting the requirement of notice of such facts from Rules 4-2(c) and 8-1(3), which require the court to notify the parties only of the reasons for consideration of reference, not the alleged facts underlying such reasons. Since the petition, like all documents in the court file, is available for inspection by the parties, Minn. Stat. § 260.161 (1) (1967), the attorney for the child could ascertain such facts by examining the county attorney's petition. The Rule provision will therefore preclude the child from obtaining notice of the facts only where his attorney neglects to examine the filed petition.

41. *See* text accompanying notes 6-9 *supra.*

court.[42] The Rules require that the juvenile be informed of this right in the notice of the reference hearing.[43] The court also must ascertain at the beginning of the hearing whether the juvenile is represented and if not, whether the juvenile understands his right to counsel.[44]

At the reference hearing, it would seem that in most cases a substantial conflict may exist between the juvenile's interest in remaining within the juvenile court system and the community's interest in protection. The need for counsel may well be greater at the reference hearing than at the adjudicatory hearing since the reference hearing contemplates criminal sanctions.[45] Further, the nature of the allegations might demand the presence of, and active participation by, counsel for the juvenile, for the child must contest not the existence of an alleged set of facts, as at the adjudicatory hearing, but rather the assertion of more or less expert opinions regarding his suitability for treatment under various dispositional schemes. *Kent* stressed the importance of counsel at the reference hearing in order to intelligently weigh such reports and testimony on which the decision to refer may be based.[46]

Although most rights accorded the juvenile by the Rules are waivable, the right to counsel at the reference hearing is not, if the act alleged would be a felony if committed by an adult.[47] This provision apparently reflects the view that a juvenile might waive his right to counsel without full understanding of the consequences of such waiver. If the presence of counsel at the reference hearing is generally desirable, it is critical where the offense would be a felony in criminal court because of the severe consequences which might follow from a criminal con-

42. MINN. STAT. § 260.155(2) (1967). Both the child and his parent are parties, MJCR 1-2(o), to whom the right to counsel is granted under MJCR 2-1. Each has the right to separate counsel where their interests conflict.

43. MJCR 4-2(d).

44. MJCR 8-4, 5-1; *see also* Note, *Basic Rights for Juveniles in Juvenile Proceedings Under the Minnesota Juvenile Court Rules: A Response to Gault*, 54 MINN. L. REV. 335 (1969).

45. *Kent* quoted with approval a holding of the Court of Appeals for the District of Columbia that the need for counsel is greater at the reference hearing than at the adjudicatory hearing. Kent v. United States, 383 U.S. 541, 558 (1966), *citing* Black v. United States, 355 F.2d 104, 106 (D.C. Cir. 1965).

46. 383 U.S. 541, 562-63 (1966). The Court in *Gault* later referred to *Kent* as indicating counsel to be "essential" for the purposes of the reference hearing. *In re* Gault, 387 U.S. 1, 36 (1967).

47. MJCR 1-5(1).

viction if the case is referred.[48] The Rules provide that the child may, however, waive his right to counsel if the act alleged would not be a felony, since the consequences of a criminal conviction in such a case are less severe.

D. Admissibility of Evidence

Although the reference hearing occurs prior to adjudication, it is essentially a dispositional hearing.[49] The juvenile's guilt is not at issue; rather, the issue is the proper disposition *if* he is found to have committed the acts alleged. It is therefore desirable that the court have available to it the maximum reliable information relevant to the question of whether the juvenile will respond to juvenile facilities and programs.

The use of social and probation reports is common in the post-adjudicative stage of adult sentencing determinations. Such information is necessary in order to individualize the disposition of the adult offender.[50] Thus it appears, for the same reason, that social reports should be available to the juvenile judge at the reference hearing. Indeed, the nature of the reference hearing renders the social study, which is an investigation of the personal and family history and the environment of the juvenile,[51] a particularly apt source of information relevant to the decision.

However, the Minnesota statute prohibits undertaking a social study prior to the hearing if the juvenile denies the allegations of the petition.[52] Apparently, no such report could be admitted into evidence at the reference hearing, and is therefore unavailable for the determination of whether to refer the case for pro-

48. Council of Judges, Nat'l Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 11 (1969) also suggests a nonwaivable right to counsel. *Cf.* Michigan Juvenile Court Rules, Rule 11 (1969) requiring counsel to be appointed unless the parties request to the contrary. Nat'l Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act, § 26 (1969) [hereinafter cited as Uniform Juvenile Court Act] provides a waivable right to counsel.

49. For a further discussion of admissibility of evidence, see Note, *Standards of Proof and Admissibility in Juvenile Court Proceedings*, 54 Minn. L. Rev. 362 (1969).

50. *E.g.*, Williams v. New York, 337 U.S. 241 (1949).

51. *See* Minn. Stat. § 260.151 (1967); MJCR 10-1.

52. Minn. Stat. § 260.151(2) (1967). This provision is apparently based on a concern for the child's privacy at this stage of the proceeding, rather than on a concern that hearsay evidence should not be admissible, since the prohibition is directed at the "conducting" of such a study.

secution. The Rules do provide, however, that a reference study[53] may be made and admitted into evidence at the reference hearing. This study consists of the juvenile court record of the child and the circumstances surrounding any violation of law which is the basis of the delinquency charge. But due to its restricted scope, the reference study would appear to be of limited value in aiding the reference decision. It will not contain any information concerning the child's environment or emotional attitude, both of which are relevant in determining the child's suitability to juvenile rehabilitation programs.

While precluding the social study, the statute is silent on the question of what other evidence is admissible at the reference hearing. However, the Rules provide a broad standard of admissibility and expressly allow hearsay and opinion evidence.[54] Clearly all evidence relevant to the issue of referral should be available to the court, and it is particularly desirable to allow the child to present all evidence which may point to the possible success of his rehabilitation within the juvenile system.[55] However, the state will be more likely than the child to take advantage of this blanket allowance of hearsay. While the state may introduce statements of third parties tending to show unsuitability for treatment or danger to the public, it seems unlikely that the child would present *hearsay* evidence to the effect that he is capable of benefiting from the juvenile court's disposition.[56]

The combination of the statute and the Rules produces the questionable result that, in the reference hearing, the somewhat screened hearsay in the social report is inadmissible, yet other less controlled hearsay is admissible. While social reports contain substantial hearsay evidence, the hearsay in such reports has presumably been screened by a trained social worker or probation officer, thus establishing some limitation of the amount and kind of hearsay in the report. Since there is no

53. MJCR 10-4.
54. MJCR 8-6.
55. *See generally* Note, *supra* note 19, at 335-39; Comment, *Separating the Criminal From the Delinquent, supra* note 7. Stressing the importance of the reference decision, the UNIFORM JUVENILE COURT ACT, *supra* note 48, § 34, Comment (1969) favors a "full and unrestricted" hearing.
56. Evidence of this sort would appear most likely to come from the child himself. Further, relevant opinion evidence would be admissible without the Rule provision. *See generally* J. LIVERMORE, MINNESOTA EVIDENCE § 55 (1968); C. MCCORMICK, EVIDENCE §§ 11-12 (1954).

screening of the hearsay that is admissible at the reference hearing, the possibility of use of such information is much more extensive. The purposes of the reference hearing would be better served if the statute were amended to allow the use of a social study. Even though intrusion into the privacy of the juvenile and his family would result,[57] the reference decision should be made on the basis of the most complete and relevant information possible.

With such a broad scope of admissibility, the Rules properly preclude the use of reports and testimony from the reference hearing in the later juvenile court adjudicatory hearing. Although the statute bars the use of such evidence in any non-juvenile court,[58] it makes no similar provision for subsequent hearings in the juvenile court. The statutory bar on the use of evidence in a subsequent criminal prosecution is, at least in part, grounded on the fear that the state may use the hearing as an exploratory discovery proceeding. The Rules clarify and extend this policy and provide that hearsay and opinion evidence[59] and the reference study[60] are inadmissible at a subsequent adjudicatory hearing in the juvenile court.[61]

Where the court has considered and denied reference, the Rules provide that the child may require a different judge to sit at the subsequent adjudicatory hearing.[62] The judge at the reference hearing must necessarily receive information adverse to the child which would not be admissible at the adjudicatory hearing. Therefore, a new judge may be necessary to provide an impartial determination of the factual allegations of the petition.

E. Criteria for Reference for Prosecution

While the Minnesota statute requires that, prior to reference, the court find that one of the two bases for reference exists, it does not indicate what criteria are relevant to this determina-

57. *See* note 52 *supra.*
58. Minn. Stat. § 260.211(1) (1967).
59. MJCR 5-3.
60. MJCR 10-4(3).
61. *Compare* Uniform Juvenile Court Act, *supra* note 48, § 34(d) (1969) which provides not only that testimony given by the juvenile at the reference hearing is inadmissible in the later criminal proceeding, but also that any statements made by the juvenile after being taken into custody and prior to notice of the reference hearing are not admissible over objection in the criminal proceeding.
62. MJCR 8-8. The Uniform Juvenile Court Act, *supra* note 48, § 34(e) (1969) has a similar provision.

tion.[63] Similarly, courts seldom articulate the criteria upon which their decision was based.[64] The few available studies of reference for prosecution indicate that a wide variety of criteria are used, and that many of these are of questionable relevance.[65] The Rules deem four criteria relevant to the statutory conclusions: (1) the type of offense; (2) whether the offense is part of a repetitive pattern; (3) the record of the child; and (4) the relative suitability of programs and facilities available to the juvenile and criminal courts.[66]

With respect to these criteria, an initial ambiguity arises since four criteria are listed as relevant to two conclusions, either of which will support reference for prosecution. There is no indication in the Rules whether all are intended to be equally relevant to each of the statutory conclusions. For example, the criterion of the "type of offense"[67] may be relevant to a conclusion that the public safety requires reference but seems to

63. One court has stated with regard to the absence of such standards:

> It is disquieting to me to learn that judicial action is taken without governing standards available to the public. To me this absence permits judicial decision by whim or caprice, and leads to unequal treatment under the law to the parties before the court.

United States v. Caviness, 239 F. Supp. 545 (D.D.C. 1965). *Cf.* the recently revised Texas reference statute, TEX. CIV. STAT. art. 2338-1(6)(h) (Supp. 1968), which lists a number of factors deemed relevant.

64. One of the few cases which gives any indication of the factors a district court looked to in ruling on the analogous motion to convene itself as a juvenile court is United States v. Caviness, 239 F. Supp. 545 (D.D.C. 1965).

65. Advisory Council of Judges, National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts*, 8 CRIME & DELINQ. 3 (1962); TASK FORCE, *supra* note 5, 78, app. B, table 5 (1967); Comment, *Waiver of Jurisdiction in Wisconsin Juvenile Courts*, 1968 WIS. L. REV. 551.

66. MJCR 8-7(2)(a)-(d). Criteria (a),(c) and (d) are the same as those recommended by the Advisory Council of Judges, National Council on Crime and Delinquency in *Transfer of Cases Between Juvenile and Criminal Courts*, 8 CRIME & DELINQ. 3 (1962). It is relevant to note again the limited nature of the information available to the court at this stage of the proceeding. Because of the statutory prohibition on conducting a social study prior to the hearing if the child denies the allegations of the petition, only the limited reference study may be made. A social study is, however, admissible in other jurisdictions. *See, e.g.*, N.J. JUV. CT. RULE 6:3-9, which allows a social investigation to be made at any time. *See also* TEX. CIV. STAT. art. 2338-1(6)(d) (Supp. 1968). THE UNIFORM JUVENILE COURT ACT § 28(a) (1969) permits a social investigation to be made after notice of the hearing is given. *See* text accompanying notes 50 & 51 *supra*.

67. MJCR 8-7(2)(a).

have little relevance to the juvenile's suitability for treatment.[68]

On the other hand, the "type of offense" criterion appears to be easily translatable into the criterion of the "seriousness of the offense." This criterion should not be relevant to the issue of the juvenile's suitability to juvenile court treatment since a young murderer may be no less capable of rehabilitation than a young shoplifter. Most authorities agree that the commission of a particularly serious crime does not necessarily preclude juvenile rehabilitation and treatment.[69]

Nor does the seriousness of the offense appear to be directly relevant to the issue of the protection of the public safety. One severe offense would not automatically indicate the likelihood of repetition. Rather, additional factors such as the circumstances surrounding the crime, whether it involved force or violence, the mental state of the juvenile at the time the offense was committed and the nature of the reasonably foreseeable consequences of the act are more directly relevant to the issue of the public safety.[70] From these and similar factors, a rational judgment might be drawn concerning the juvenile's danger to the public.

The second and third criteria are relevant both to the issue of suitability for treatment and to the issue of public safety. Both a repetitive pattern of conduct[71] and a previous juvenile record[72] indicate either that the child is dangerous to the public, if the acts are serious, or that prior juvenile treatment programs have been unsuccessful. Both criteria point to past conduct of the juvenile, providing perhaps the best available basis for drawing inferences about his possible future conduct.

The final criterion, the relative suitability of programs and

68. The type of offense may be relevant in those few cases where the nature of the offense itself, for example, a compulsive act, indicates a continuing likelihood of future harm.

69. *See* Advisory Council of Judges, *supra* note 65, at 6; Comment, *Representing the Juvenile in Waiver Proceedings*, 12 ST. L.U.L.J. 424 (1968). *But see* Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583, 605 (1968).

A number of statutes deem seriousness a factor, *e.g.*, TEX. CIV. STAT. art. 2338-1(6)(g) (Supp. 1968). *Cf.* CAL. WELF. & INSTN'S CODE § 707 (Supp. 1968), which under a test of "not a fit and proper subject" to be dealt with under juvenile procedures, states that in so determining, "the offense, in itself, shall not be sufficient" to support a finding that the minor is not a fit and proper subject.

70. *See, e.g.*, Juvenile Court of the District of Columbia, UNIFORM POLICY POSITION OF THE JUDGES (May 18, 1966).

71. MJCR 8-7(2)(b).

72. MJCR 8-7(2)(c).

facilities available to either set of courts,[73] is clearly an important consideration since the reference decision is essentially dispositional. An analysis of the suitability of such programs and facilities available to each court, including such factors as personnel available, type of population in a particular institution and the type of security necessary, seems necessary if the decision is to be rationally made.[74]

One difficulty presented by the form of the statute is that at least one of the conclusions required is neither clearly nor readily ascertainable. The statutorily required conclusion of unsuitability to treatment is at best a nebulous concept. Indeed, several commentators have doubted whether such conclusions can be meaningfully drawn given the present stage of psychiatry and social work.[75] The conclusion of unsuitability, because of its vagueness, is open to abuse as a convenient rationalization which may allow a court to refer when it desires to do so for a variety of irrelevant or unarticulated reasons.

Public pressure may be such an unarticulated but powerful factor. Both the prosecutor and the judge may be under pressure to refer the case of a juvenile who has allegedly committed a serious offense. Although the independent judiciary is supposed to exercise its responsibilities free from the pressures of the political arena, the Rules may not sufficiently exclude this factor from consideration. The "type of offense" criterion, allowing consideration of the seriousness of the offense, could be the means by which public pressure forces a decision to refer.

If the juvenile has committed a serious offense *and* is in fact extremely dangerous, or if the failure of prior treatment attempts indicates the likelihood of additional failures in the future, reference should, of course, be considered. For example, in the case of a juvenile who has allegedly committed a series of armed grocery store holdups in which persons were injured, and whose mental condition indicates that he may rob again, there is evidence of his dangerousness and perhaps his unsuitability to treatment under juvenile court facilities. On the other hand, if he has committed a serious offense but is not extremely dangerous or there is no substantial evidence indi-

73. MJCR 8-7(2)(d).

74. *See, e.g.*, TEX. CIV. STAT. art. 2338-1(6)(h)(6) (1968); MICH. JUV. CT. RULE 11.1(B)(4) (1969).

75. *See* Croxton, *The Kent Case and Its Consequences*, 7 J. FAM. L. 1 (1967); Schultz, *The Adversary Process, the Juvenile Court and the Social Worker*, 36 U. MO. K.C.L. REV. 288 (1968).

cating that he is likely to be unresponsive to juvenile court disposition, then reference should not be considered. For example, in the case of a juvenile with no prior record who has allegedly committed a highly situational crime, such as an assault upon a girlfriend's just-discovered lover, there may be no more reason to conclude that he is either more dangerous or incapable of rehabilitation than other juveniles. If he is unlikely to repeat the act and appears likely to benefit from the juvenile court's treatment programs, the fact that he has committed a serious offense should be irrelevant to the issue of reference. The criterion of the "type of offense" may, however, allow public pressure to force reference in a case where the child is neither unsuitable to juvenile court disposition nor sufficiently dangerous so that the public safety cannot otherwise be protected.

The four criteria provided in the Rules are not exhaustive. Additional relevant criteria have been employed in other jurisdictions. The policy memorandum of the Juvenile Court of the District of Columbia[76] provides the same two basic standards as the Minnesota statute, either of which is sufficient to support a decision to refer for prosecution. The memorandum recommends, as relevant to the basic standards, a consideration of the age of the juvenile to the extent that a length of time beyond the limits of juvenile court jurisdiction is required for reasonable prospects of rehabilitation.[77] This factor is relevant to the suitability issue in that a juvenile may not be suitable to juvenile court disposition should any treatment program need to continue beyond age 21. It is relevant to the public safety issue in that the juvenile must be released from the juvenile facility at age 21, and if unaffected by its rehabilitative efforts, may commit another offense. This factor may be subsumed in the Rules under the criterion of "relative suitability of programs" in either court. To the extent that it may not be, however, it would be desirable to list it as an additional factor.

Further, the criterion of the protection offered to juveniles within juvenile institutions[78] is not mentioned in the Rules although it may also be considered under the criterion of "relative suitability of programs and facilities." Since it is relevant both to the dangerous juvenile's suitability to treatment and to the

76. UNIFORM POLICY POSITION OF THE JUDGES, *supra* note 70.

77. *See also* Comment, *Criminal Offenders in the Juvenile Courts: More Brickbats and Another Proposal*, 114 U. PA. L. REV. 1171 (1966).

78. *See generally id.*

safety of other juveniles within the system, it would be desirable to indicate it as an additional criterion.

A final factor considered in other jurisdictions is the presence of co-offenders over the juvenile age limit, especially where the adult offenders are just over the juvenile age.[79] This criterion tends to promote equality of treatment and to eliminate disparity in sentencing. It is, of course, subject to the criticism that it arbitrarily deprives the juvenile of the benefits of the juvenile court act because of the age of his co-offenders.[80] This objection would be especially acute where the crime alleged was serious. Nonetheless, it would appear to be relevant if the juvenile's involvement in the alleged crime approximated that of the other participants.

IV. CONCLUSION

The Minnesota reference for prosecution statute, by prescribing minimal procedural requirements and providing that the court find either unsuitability for treatment or that the public safety requires reference, provides a suitable basis upon which a rational policy of reference for prosecution can be developed. Article 8 of the Rules is a major improvement clarifying and amplifying the statute. It complies with, and, in some instances, extends current Supreme Court requirements. Perhaps the major contribution of the Article is to illuminate a process which has traditionally been obscure, and to prescribe basic procedural and substantive standards for the guidance of juvenile courts and attorneys with a view to the ultimate goal of fairness to the juvenile.

On the basis of the foregoing analysis, several modifications may be suggested. First, the notice provision should be revised to require the court to give notice of the alleged facts supporting the reasons for consideration of reference for prosecution. This modification would provide counsel a more adequate opportunity to intelligently prepare the child's case. The seriousness of the decision requires the most complete preparation, and therefore the most complete notice.

Second, the statute should be amended to allow the use of a

79. This factor is mentioned in the prior standards of the District of Columbia, Memorandum No. 7, Nov. 30, 1959, now rescinded. These standards appear as an appendix to the opinion of the Court in Kent v. United States, 383 U.S. 541, 565 (1966).

80. This factor is criticized as irrelevant in Comment, *supra* note 69.

social study at the reference hearing. The social report appears likely to be the most relevant source of information bearing on a sound decision on whether to refer. Additionally, the broad admissibility of hearsay evidence provided by the Rules should be examined in light of its effect upon the nature of the evidence actually admitted at the reference hearing. If it appears that the present provision does not benefit the juvenile in presenting his case to the court, or that the state is using the provision to introduce unreliable hearsay, a limitation of the hearsay allowance should be considered.

Third, the "type of offense" criterion should be reconsidered to ascertain whether its basis is actually the danger of the juvenile, or merely the seriousness of the offense. If it is construed as danger, a revision should so indicate. If seriousness of the offense is meant, this criterion focuses on a factor which does not go directly to the question of either unsuitability or public safety, and should be deleted as an essentially irrelevant consideration.

Finally, other factors should be considered as relevant to the Minnesota statutory requirements, such as the juvenile's age in relation to the time likely to be necessary for rehabilitation, and the amount of protection afforded to juveniles within juvenile institutions from a particularly dangerous juvenile.

Regardless of the acceptability of any of these possible modifications, the important factor is, of course, that the Article actually promote the just determination of the issues in the reference hearing. The Article as presently drafted is a sound step toward the achievement of that goal.